

**REQUEST FOR RECONSIDERATION OF FEDERAL SUBSISTENCE BOARD
PROPOSAL FSA06-01b, GRANTING NINILCHIK A SPECIAL ACTION
WINTER FISHERY THROUGH THE ICE IN TUSTUMENA LAKE USING
GILLNETS AND OTHER MEANS**

By State of Alaska

I. Introduction

The State of Alaska, through the Alaska Department of Fish and Game (ADF&G), respectfully requests that the Federal Subsistence Board (Board) reconsider and rescind its special action determination (FSA06-01b) published in the Federal Register as being effective November 17, 2006, through March 31, 2007. *See Federal Register*, Vol. 71, No. 243, dated Dec. 19, 2006, at pp. 75883-885. That acknowledged “*exception* to the [federal] Subsistence Management Regulations” currently provides for a preferential winter harvest by Ninilchik residents of 200 lake trout, 200 rainbow trout, 500 Dolly Varden, and all other types of fish, including steelhead, salmon and whitefish, caught “incidentally” through the ice of Tustumena Lake, by gillnet or jigging gear. *Id.* at 75883 (emphasis added).

Reconsideration is required because, in adopting that final rule, “the Board’s interpretation of information, applicable law, or regulation is in error or contrary to existing law” and needs to be corrected. 36 CFR §242.20(d); 50 CFR §100.20(d). Therefore, the Board is requested to correct and rescind its “exceptional”, unsupported action creating this winter fishery, effective immediately, well before the fishery ends on March 31, 2007.¹

II. Grounds for Reconsideration

This Request for Reconsideration (RFR) is based on the entire record presented to the Board in relation to this Special Action, including comments of the Board members and legal advisors at the Board’s Work Session Meeting on November 16, 2006 disclosing the absence of requisite findings to support the action under the law. It is

¹ In requesting reconsideration, the State does not waive any of its rights to pursue other legal remedies available to it under applicable law, including court action. It is also the State’s position that, under the circumstances presented, it does not have to make this request for reconsideration in order to exhaust administrative remedies. In any event, this RFR provides the Board with a reasonable opportunity to address the State’s grievances immediately and thereby possibly resolve the issue and eliminate the State’s pursuit of relief in another forum.

based on the detailed grounds set out in the “ADF&G Detailed Comments on FSA06-01b for the Federal Subsistence Board Meeting on November 16, 2006” which are part of the Board record, in the previous letters on the subject dated August 8, 2006 and September 1, 2006 from former ADF&G Commissioner McKie Campbell to then Acting Board Chairman Ron McCoy, which are also a part of the Board record, and in ADF&G Deputy Commissioner David Bedford’s comments at the Board Meeting on November 16, 2006, at Transcript pp. 18-21. Those entire grounds and comments are incorporated herein by reference.

Without waiving any of those grounds, the primary bases for this RFR are that the special action was taken without it first being shown or determined: (1) that there were “*extenuating* circumstances *necessitating* a regulatory change before the [Board’s] next annual subpart D proposal cycle” (i.e., that a *special* action was necessary) -- as is specifically required by the Board’s regulations 36 CFR §242.19(c) and 50 CFR §100.19(c) under which the Board acted; and (2) that “the proposed temporary change will *not* interfere with the conservation of healthy fish and wildlife populations, will *not* be detrimental to the long-term subsistence use of fish or wildlife resources, and is *not* an unnecessary restriction on non-subsistence users” -- as is required by 36 CFR §242.19(e) and 50 CFR §100.19(e) (relied on by the proponent of the special action request). (Emphasis added).

A. The Necessary Extenuating Circumstances Were Not Shown.

Subsections 36 CFR §242.19(c) and 50 CFR §100.19(c) provide:

The Board will accept a request for a change in seasons, methods and means, harvest limits and/or restrictions on harvest under this §100.19 *only if* there are *extenuating circumstances necessitating* a regulatory change before the next annual subpart D proposal cycle. Extenuating circumstances include *unusual and significant changes in resource abundance* or *unusual conditions affecting harvest opportunities that could not reasonably have been anticipated* and *that potentially could have adverse effects on the health of fish and wildlife populations or subsistence uses*. Requests for Special Action that do not meet these conditions *will be rejected* (Emphasis added)

These legal requirements were never met. Therefore, the special action request had to be rejected, as a matter of law. No evidence (or even argument) was presented to the Board to demonstrate, or to support a finding, that “unusual and significant changes in resource abundance” had occurred to justify special action. Nor were any “unusual conditions affecting harvest opportunities that could not have been reasonably anticipated” shown. To the contrary, when the proponent of the request, the Ninilchik Traditional Council (NTC), sued this Board and its Chairman for previously denying the first part of NTC’s Special Action Request (also submitted in August 2006, requesting a

fall coho salmon dipnet fishery, and denoted FSA06-01a), the United States District Court expressly held, as a matter of law, that the necessary showing had not been made. The Court specifically stated:

The argument that there were extenuating circumstances is that there was no subsistence use fishery for the residents of Ninilchik on the Kasilof River despite the fact that their customary and traditional use of the Kasilof River had been recognized in a regulation published in March of 2006. That is true, *but it is hardly something that was not foreseen when the regulation was published. Rather it is something that will have to be addressed by the Board in its annual regulatory cycle.*

Ninilchik Traditional Council v. Fleagle, No. 3:06-cv-213 JWS (D. Alaska Sept. 20, 2006) (Order and Opinion, Clerk's Doc. No. 18). (Emphasis added)

The Board should have applied that same reasoning to the second part of that Special Action Request seeking to create a subsistence winter ice fishery in Tustumena Lake. There is no difference in the regulatory requirements that apply to the two parts of that Special Action Request, or in the failure to meet those requirements. As the Board's Chair recognized on the record during the Board's November 16-17, 2006 proceedings considering the request:

I will be casting a dissenting vote. And my reasoning . . . is similar to the argument on the first half of this request, and that was the coho fishery on the Kasilof [it is] with the *process* And I'd like to be consistent in requiring a definable predictable process . . . [rather than] through a special action request. * * * I still feel that we're in the same boat as we were when we didn't pass the other half of the proposal. I don't see that anything has changed, . . . I would prefer to see all of the fisheries issues before the Board in its normal cycle.

Tr. 11/16-17/06 Board Work Session, at p. 28 (emphasis added).

Indeed, the proponent of the request made no other effort to satisfy those requirements. According to the Staff Analysis of the federal Office of Subsistence Management (OSM) dated November 1, 2006, at p. 1, the only reason given was: "According to the proponent, this Request for Special Action is a *starting point* to further develop Federal subsistence fishing regulations during the normal regulatory process." That explanation does not at all fulfill the "unusual circumstance" requirements for a special action under the applicable regulation. There is nothing "exceptional" about that reason. As ADF&G noted at page 3 of its written Detailed Comments provided to the Board before the November 16-17 proceedings:

NTC's RSA fails to explain any basis for an argument that the request meets the requirements of 50 CFR 100.19(c), instead jumping over this preliminary analysis into a perfunctory attempt to address the substantive requirements of 50 CFR 100.19(e). Nothing has changed since the Board's meeting in January 2006, and there have been no significant changes in resource abundance or unusual conditions affecting harvest opportunities that could have significant adverse effects on the health of fish and wildlife populations or subsistence uses.²

In making its determination, the Board apparently relied on advice of its legal advisor stated on the record that the Board is not limited to the "examples of extenuating circumstances" given in the regulation but has the discretion to find other "extenuating circumstances". Tr. at 21-23. However, even if that were the case, that discretion would be limited to *exceptional* circumstances of the type "exemplified" in the regulation and clearly enunciated and found by the Board on the record.

That was not this case. No exceptional reason of that type was offered, and none was enunciated by the Board members as being relied on by the Board in making its decision. Tr. pp. 23-31. All comments by Board members supporting the motion to grant the RSA before passing it instead focused upon characterizing it as a "modest proposal" and reiterating the three criteria of subsection 19(e). *Id.* Only *after* the motion passed and only *after* the Board's legal advisor cautioned the Board he needed the Board's reasoning to satisfy the requirements of subsection 19(c) on the record (*id.* at 29), did two members of the Board attempt to do so. Even then all they stated, in effect, was that they thought that the residents of Ninilchik should be given some opportunity to harvest the fishery some 11 months after the Board's customary and traditional use determination previously sought by Ninilchik had been made for that area in January 2006, rather than have to wait for proposals scheduled for Board consideration at its next normal regulatory cycle five to six months later. *Id.* at 30. However, other communities have had to wait that long (or longer) before, for actual harvest ways and means to be implemented by the Board after a positive C&T determination, given the nature of the Board's normal annual regulatory cycle provided by regulation. That is particularly true if there were no active take proposals submitted and pending at the time of the C&T determination, as in the case of Ninilchik.³ There is nothing "exceptional" about that circumstance either.

² To the contrary, as part of its §100.19(e) request NTC argued, as it had to in order to attempt to satisfy that part of the regulation, that granting the special action request would have *no* adverse effects on the targeted fish stocks, and the Board had to so find (despite insufficient evidence to do so, which is the second chief point of this RFR).

³ Tr. at 9.

It is respectfully submitted that none of that reasoning satisfies the exceptional circumstances requirement of the regulation, especially when that reasoning only becomes suggested after the fact of the Board's decision. Otherwise, the "exception" would have no limits, and there would be no reason for or meaning to the rule. The Board's discretion is limited by the Board's own rules, which impose reasonable constraints on the Board's actions. Those rules and constraints cannot be ignored or interpreted away.

B. It Was Not Shown That the Tustumena Lake Harvest Ordered by the Board Would Have No Adverse Impact on the Fish Stocks, Future Uses, and Other Users Affected by It.

Both the written comments of the ADF&G and OSM staff provided to the Board, and additional oral comments given at the Board proceedings, emphasized that there was very little information available about the abundance or distribution within Tustumena Lake of the resident fish species being targeted by the RSA. *See, e.g.*, ADF&G written Detailed Comments at 1-2; Staff Analysis at 5-6; Tr. at pp. 19-20, 9-10. It was also accepted information that such resident species had a long-standing history of over-exploitation, slow growth, and low reproductive potential necessitating a conservative management and harvest approach in order to assure harvest opportunity while sustaining stocks. *Id.* In addition, ADF&G demonstrated that the State already provided adequate opportunities to the residents of Ninilchik to harvest ample trout and other resident species of the type and in the area targeted by the RSA under the State's current sport fish regulations, as well as provided much salmon for the residents of Ninilchik under the State's personal use and cultural and educational purpose fisheries, meaning that no further fishery risking detriment to a healthy, sustainable fish population and restriction of other uses and users was necessary. *Id.* That being the case, the Board was without sufficient information to determine "that the proposed temporary change will not interfere with the conservation of healthy fish . . . populations, will not be detrimental to the long-term subsistence use of fish . . . resources, and is not an unnecessary restriction on non-subsistence users", as it is required to determine by 36 CFR §242.19(e) and 50 §100.19(e).

C. Other Grounds

Other grounds supporting this RFR, including (1) other Board failures regarding procedural and agreed-upon processes, (2) the Board's failure to definitively decide the State's two May 5, 2006 Requests for Reconsideration of FP06-09 granting historical customary and traditional use determinations for Ninilchik, Hope and Cooper Landing, and (3) the Federal Government's failure to satisfy the necessary legal prerequisites to creating Board jurisdiction to make such determinations affecting navigable waters within the State like Tustumena Lake, are set out in the State's separate RFR being

submitted herewith concerning those matters and those communities, and are incorporated herein by reference in further support of this Request for Reconsideration.

III. Conclusion

Accordingly, the Board is respectfully requested to reconsider and rescind its action taken upon FSA06-01b immediately.

STATE OF ALASKA
DEPARTMENT OF FISH AND GAME

DATED: _____

16 Jan 07



DENBY S. LLOYD, ACTING COMMISSIONER